

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CONTRELLE ARDELL HARBIN,

Defendant-Appellant.

UNPUBLISHED

March 31, 2009

No. 279872

Wayne Circuit Court

LC No. 06-014546-01

Before: Borrello, P.J., and Davis and Gleicher, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of two counts of first-degree premeditated murder, MCL 750.316(1)(a), three counts of assault with intent to commit murder, MCL 750.83, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to concurrent terms of life imprisonment without parole for the murder convictions, 40 to 60 years' imprisonment for the assault convictions, and five to ten years' imprisonment for the felon-in-possession conviction, all to be served consecutively to a two-year term of imprisonment for the felony-firearm conviction. We affirm.

Defendant's convictions arise from a shooting spree in Detroit on November 16, 2006. Elton Ash and Ophelia Fry were both shot as they waited to enter their place of employment at the Angelland Day Care Center on Linwood Street. Ash survived, but Fry died from her injuries. Arthur Smith was shot and killed down the street from the day care center. Two other victims, James Brown and Dennis Anderson, were assaulted by gunfire while inside Anderson's nearby garage. At trial, the defense theorized that defendant had been mistakenly identified as the shooter.

Defendant first contends that the trial court erred in denying his motion to suppress the identification testimony of James Brown on the ground that Brown identified defendant at an unduly suggestive pretrial lineup. "The trial court's decision to admit identification evidence will not be reversed unless it is clearly erroneous." *People v Barclay*, 208 Mich App 670, 675; 528 NW2d 842 (1995). "A decision is clearly erroneous when the reviewing court is left with a definite and firm conviction that a mistake has been made." *Id.*

“A lineup can be so suggestive and conducive to irreparable misidentification that it denies an accused due process of law.” *People v Hornsby*, 251 Mich App 462, 466; 650 NW2d 700 (2002). “The fairness of an identification procedure is evaluated in light of the total circumstances to determine whether the procedure was so impermissibly suggestive that it led to a substantial likelihood of misidentification.” *Id.* Because counsel was present at the lineup, defendant has the burden of demonstrating that the lineup was impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 286; 545 NW2d 18 (1996).

Although defendant points to physical differences among the lineup participants, such differences do not necessarily render the procedure defective. Differences “are significant only to the extent that they are apparent to the witness and substantially distinguish the defendant from the other lineup participants.” *Hornsby*, *supra* at 466. The record discloses that the six lineup participants were black males of similar age, weight, and height, and each had a mustache and goatee. Brown testified that he believed that all six participants were light-skinned, and no evidence supported that he focused on any particular physical characteristic when making the identification.

“[F]actors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the [offender] at the time of the crime, the witness’s degree of attention, the accuracy of the witness’s prior description of the [offender], the level of certainty demonstrated by the witness at the [identification], and the length of time between the crime and the [identification].” *Neil v Biggers*, 409 US 188, 199; 93 S Ct 375, 382; 34 L Ed 2d 401 (1972). In this case, Brown testified that the shooter walked right up to him and that he observed the person for 15 to 20 seconds in light conditions. Additionally, the lineup took place on the day of the shooting and Brown identified defendant almost immediately, explaining that the image of the shooter remained clear in his mind and that he immediately recognized defendant as the shooter. In light of this record, the trial court did not clearly err in rejecting defendant’s claim that the lineup qualified as unduly suggestive.

Defendant next raises two instructional issues. “This Court reviews jury instructions in their entirety to determine whether there is error requiring reversal.” *People v Gonzalez*, 256 Mich App 212, 225; 663 NW2d 499 (2003). This Court will not reverse a conviction if the instructions fairly presented the issues to be tried and sufficiently protected the defendant’s rights. *Id.* Because defendant did not preserve either instructional claim with an appropriate objection at trial, this Court reviews the unpreserved claims only for plain error affecting his substantial rights. *Id.*; see also *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

Defendant first maintains that the trial court erred by failing to give a specific intent instruction with respect to the offenses of first-degree murder and assault with intent to commit murder. A review of the record shows that the trial court instructed the jury on the requisite intent for first-degree murder in accordance with CJI2d 16.1, and the requisite intent for assault with intent to commit murder in accordance with CJI2d 17.3. Because these instructions adequately conveyed the intent requirements for both offenses, an additional specific intent instruction was unnecessary. See *People v Maynor*, 470 Mich 289, 295-297; 683 NW2d 565 (2004). Notably, the former standard jury instruction on specific intent, CJI2d 3.9, has been deleted because the individual offense instructions contain the required mens rea element for each offense, and an additional specific intent instruction was viewed as “redundant at best and

potentially confusing at worst.” CJI2d 3.9 [deleted] (Committee Note). Accordingly, the trial court did not commit plain error by failing to give an additional specific intent instruction.

Defendant also asserts that the trial court gave conflicting instructions regarding the use of prior inconsistent statements. At one point, the court instructed the jury that it could consider a witness’s prior inconsistent statement only to decide whether the witness was testifying truthfully in court, and not for the truth of the prior statement. Later, the court instructed the jury that

evidence has been offered that one or more witnesses in this case previously made statements inconsistent with their testimony at this trial. You may consider such earlier statements in deciding whether the testimony at this trial was truthful and in determining the facts of the case.

We view neither instruction as technically inaccurate. Although a prior inconsistent statement offered for impeachment generally cannot be used as substantive evidence, a prior statement can constitute substantive evidence if a hearsay exception applies, or the prior statement is not hearsay and is substantively admissible. *People v Jenkins*, 450 Mich 249, 260-261 (Levin, J.), 273 (Riley, J., dissenting); 537 NW2d 828 (1995); *People v Kohler*, 113 Mich App 594, 599; 318 NW2d 481 (1982). The propriety of the trial court’s instructions thus must be reviewed against the statements to which they pertain. However, defendant has failed to identify any specific prior statement offered at trial. Therefore, he has not established a plain error. Even assuming that the trial court plainly erred by giving conflicting instructions regarding the use of prior inconsistent statements, defendant has the burden of demonstrating that his substantial rights were affected, which generally requires a showing of prejudice, i.e., that the error affected the outcome of his trial. *Carines*, *supra* at 763. Defendant has made no attempt to meet the prejudice prong of the plain-error test. Consequently, we reject his claim of error.

Defendant lastly argues that the trial court violated his constitutional right of confrontation when it declined to allow the introduction of his police statement for the purpose of rebutting an inference that he had admitted his involvement in the charged offense. “A limitation on cross-examination that prevents a defendant from placing before the jury facts from which bias, prejudice, or lack of credibility of a prosecution witness might be inferred constitutes denial of the constitutional right of confrontation.” *People v Kelly*, 231 Mich App 627, 644; 588 NW2d 480 (1998).

In this case, the interrogating police officer never testified that defendant admitted his guilt or confessed to the crimes, but merely that defendant questioned the officer about the possibility of a deal and a potential penalty. Therefore, it was unnecessary for defendant to introduce his police statement, which amounted to hearsay, for the purpose of challenging the officer’s testimony. Accordingly, defendant has not established that the trial court’s exclusion of the statement violated his right of confrontation.

Even if the officer’s testimony implied that defendant had confessed and defendant’s right of confrontation was violated due to the lack of an opportunity to rebut that inference, any such error was harmless. *Kelly*, *supra* at 644. Defendant had an extensive opportunity to cross-examine the officer about the inquiries he allegedly made regarding the possibility of a deal and penalty and why such a conversation had not been documented. In addition, the evidence of

defendant's guilt was overwhelming, and included statements by others that defendant acknowledged the shootings, evidence that he deposited a blood-stained coat at the dry cleaners, and a victim's testimony positively identifying defendant as the shooter.

Affirmed.

/s/ Stephen L. Borrello
/s/ Alton T. Davis
/s/ Elizabeth L. Gleicher